

1           29. Defendants should be required to disgorge this unjust enrichment.

2           **SECOND CLAIM FOR RELIEF – UNLAWFUL, DECEPTIVE, UNFAIR BUSINESS  
PRACTICES**

3           30. Defendants' sale of tainted pet food constitutes an unlawful, deceptive and unfair  
4           business act within the meaning of the Washington Consumer Protection Act, RCW  
5           19.86 *et seq.*, and similar statutory enactments of other states (including consumer  
protection and consumer sales practice acts).

6           31. Defendants' sale of hazardous dog and cat food has the capacity to deceive a substantial  
portion of the public and to affect the public interest.

7           32. As a result of Defendants' unfair or deceptive acts or practices, Plaintiffs and other class  
8           members suffered injuries in an amount to be proven at trial.

9           **THIRD CLAIM FOR RELIEF – BREACH OF WARRANTY**

10          33. Cat food and dog food produced by Menu Foods are "goods" within the meaning of  
11           Uniform Commercial Code Article 2.

12          34. Defendants' conduct as described herein constitutes breach of an implied or express  
warranty of affirmation.

13          35. Defendants' conduct as described herein constitutes breach of an implied warranty of  
14           merchantability.

15          36. Defendants' conduct as described herein constitutes breach of an implied warranty of  
fitness for a particular purpose.

16          37. As a proximate result of the aforementioned wrongful conduct and breach, Plaintiffs and  
17           other class members have suffered damages in an amount to be proven at trial.  
Defendants had actual or constructive notice of such damages.

18           **FOURTH CLAIM FOR RELIEF – DECLARATORY RELIEF**

19          38. This court has the authority to render a declaratory judgment pertaining to Plaintiffs and  
Class Members' rights, status and other legal relations.

21          39. Plaintiffs and Class Members are entitled to a declaratory judgment that, as a matter of  
law, their companion animals had no fair market value, no replacement value, but, rather,  
an intrinsic, peculiar, unique, or special value premised on their non-fungible and  
irreplaceable nature.

23           **FIFTH CLAIM FOR RELIEF – NEGLIGENT MISREPRESENTATION**

24          CLASS ACTION COMPLAINT - 6

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40. Defendants owed Plaintiffs and class members a duty to exercise reasonable care in representing the safety of its dog and cat foods.
41. Defendants falsely represented that its dog and cat food was safe for consumption by dogs and cats.
42. In reality, defendants' dog and cat food caused dogs and cats to become ill and, in some cases, to die.
43. Plaintiffs and class members reasonably relied on the information provided by Defendants regarding the safety of its dog and cat food.
44. As a proximate cause of Defendants' false representations, Plaintiffs and other Class members suffered damages in an amount to be proven at trial.

**SIXTH CLAIM FOR RELIEF – NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**

45. IN THE ALTERNATIVE that Defendants' acts are not deemed intentional or reckless, Defendants' conduct was negligent insofar as they failed to take reasonable care to avoid causing Plaintiff and Class Members emotional distress in relation to the failure to warn and failure to produce safe food for nonhuman animal consumption. These actions or inactions caused Plaintiff and Class Members emotional distress. Said emotional distress was manifested by objective symptomology by some of the Class Members.

**SEVENTH CLAIM FOR RELIEF – NUISANCE**

46. Defendants' behavior described above constitutes a private nuisance and public nuisance.

47. Under Washington law, specifically RCW 7.48.010 and 7.48.150 (private nuisance) and RCW 7.48.130 and RCW 7.48.210 (public nuisance), and similar anti-nuisance laws (at common law and by statute), Defendants are liable to plaintiffs for general damages sustained by virtue of their omission to perform a duty, which act, namely, allowing contaminated and poisoned food products to enter Plaintiff and Class Members' households under false pretenses of safety, resulting in pain, suffering, illness, and death to Class Members' companion animals, annoyed, injured, and endangered the comfort, repose, and safety of Plaintiffs and Class Members, essentially interfering in the comfortable enjoyment of their real and personal property and their lives.

## **EIGHTH CLAIM FOR RELIEF – BREACH OF CONTRACT**

48. Plaintiffs and Class members purchased dog and cat food produced by the defendants

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1 based on the understanding that the food was safe for their companion animals to  
2 consume.

3 49. The dog and cat food produced by the defendants was not safe for companion animals to  
4 consume and caused dogs and cats to become ill or die. The unsafe nature of the pet  
5 food constituted a breach of contract.

6 50. As a result of the breach, Plaintiffs and Class members suffered damages which may  
7 fairly and reasonably be considered as arising naturally from the breach or may  
8 reasonably be supposed to have been in the contemplation of the parties, at the time they  
9 made the contract, as the probable result of the breach of it.

10 51. To the extent defendants' breach was reckless, wanton, or intentional and defendants  
11 knew or had reason to know that, when the contract was made, breach would cause  
12 mental suffering for reasons other than pecuniary loss, defendants inflicted upon  
13 Plaintiffs and Class members emotional distress.

14 **NINTH CLAIM FOR RELIEF – GROSS NEGLIGENCE**

15 52. In the event Defendants are not found to have acted recklessly, Plaintiffs and Class  
16 Members plead IN THE ALTERNATIVE that Defendants knew and/or should have  
17 known that there was a strong possibility that harm would be inflicted on Plaintiffs and  
18 Class Members as a result of their disregard in ensuring that safe foodstuffs entered the  
19 commercial dog and cat food supply, recalling the tainted product before the illness and  
20 death toll rose further, and/or not warning consumers of the tainted product.

21 53. Defendants acted indifferently to the high degree of manifest danger and erroneous  
22 destruction of sentient property, to wit, Class Members' companion animals, to which  
23 Plaintiffs and Class Members would be and was exposed by such conduct.

24 54. The proximate cause of Plaintiffs and Class Members' injuries was the grossly negligent  
25 conduct of Defendants in the above regard.

26 **TENTH CLAIM FOR RELIEF – PRODUCTS LIABILITY**

27 55. Defendants are strictly liable under RCW 7.72.030 (and analogous products liability  
28 statutes around the nation) for proximately causing harm to Plaintiffs by manufacturing a  
29 product that was not reasonable safe in construction.

30 56. The proximate cause of Plaintiffs and Class Members' injuries was the grossly negligent  
31 conduct of Defendants in the above regard.

32 CLASS ACTION COMPLAINT - 8

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57. Defendants may also be liable for design defects in the production of the contaminated food, as well as failing to warn of the design and/or manufacturing defects, making them liable under RCW 7.72.030 (and analogous products liability statutes around the nation).

## **RESERVATION OF RIGHTS**

58. Plaintiffs and Class Members reserve the right to amend the complaint to include additional causes of action and allegations as they are discovered in the course of litigation.

### PRAYER

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. Certification of the action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure with respect to the claims for damages, and appointment of Plaintiffs as Class Representatives and their counsel of record as Class Counsel;
2. Actual damages (including all general, special, incidental, and consequential damages), statutory damages (including treble damages), punitive damages (as allowed by the law(s) of the states having a legally sufficient connection with defendants and their acts or omissions) and such other relief as provided by the statutes cited herein;
3. For economic damages, representing the intrinsic, special, peculiar, or unique value of the Plaintiffs and Class Members' injured and/or killed companion animals, subject to proof and modification at trial;
4. For special and general damages relating to loss of the Plaintiffs' and Class Members' companion animals' utility (e.g., companionship) from date of loss to date judgment is entered;
5. For noneconomic damages, including emotional distress, interference with the Plaintiffs and Class Members' lives, and the use and quiet enjoyment of their realty and personality, loss and/or reduction of enjoyment of life, subject to proof and modification at trial;
6. For incidental and consequential damages arising from breach of contract;
7. For burial, afterdeath, and death investigation expenses;

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1 convalescence;

2  
3 9. Prejudgment and post-judgment interest on such monetary relief;

4 10. Equitable relief in the form of restitution and/or disgorgement of all unlawful or  
illegal profits received by Defendants as a result of the unfair, unlawful and/or  
deceptive conduct alleged herein;

5 11. Other appropriate injunctive relief;

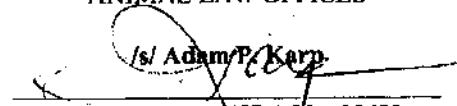
6 12. The costs of bringing this suit, including reasonable attorneys' fees; AND

7 13. Such other relief as this Court may deem just, equitable and proper.

8 14. **NOTICE:** Plaintiffs intend to seek damages in excess of \$10,000. Accordingly,  
9 this case is not subject to RCW 4.84.250-.280.

10 Dated this March 27, 2007.

11 ANIMAL LAW OFFICES

12   
13 /s/ Adam P. Karp

14 Adam P. Karp, WSBA No. 28622  
15 Attorney for Plaintiffs and Class Members  
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24 CLASS ACTION COMPLAINT - 10

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U. S. DISTRICT COURT  
WESTERN DISTRICT ARKANSAS  
FILED

MAR 21 2007

CHRIS R. JOHNSON, CLERK

BY

DEPUTY CLERK

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION

CHARLES RAY SIMS and PAMELA SIMS,  
Individually and on behalf of all others  
similarly situated,

Plaintiffs,

CIVIL ACTION NO. 07-5053

\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$

VERSUS

MENU FOODS INCOME FUND,  
MENU FOODS MIDWEST CORPORATION,  
MENU FOODS SOUTH DAKOTA INC.,  
MENU FOODS, INC., MENU FOODS  
HOLDINGS, INC.,

Defendants.

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CLASS ACTION COMPLAINT

NOW INTO COURT, through undersigned counsel, come Plaintiffs, CHARLES RAY SIMS and PAMELA SIMS (hereinafter collectively "Plaintiff," "Plaintiffs", or "SIMS"), major residents in the State of Arkansas, individually and on behalf of all others similarly situated, who file this Class Action Complaint pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), seeking monetary relief for themselves and the class they seek to represent. This suit is brought against MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC., representing as follows:

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**GENERAL ALLEGATIONS**

1. This is an action for damages relating to Defendants' design, manufacture, sale, testing, marketing, advertising, promotion and/or distribution of unsafe canned and foil pouched dog and cat food.

2. This Court has jurisdiction over the subject matter and Defendants in this case pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship between Plaintiffs and Defendants and the matter in controversy involves a request that the Court certify a class action.

3. Venue is proper in this district under 28 U.S.C. § 1331(b)(2) because a substantial part of the acts, conduct and damages complained of occurred in this district as Plaintiffs' residency is in Benton County, Arkansas, within the geographical boundaries of this Court.

**PARTIES, JURISDICTION AND VENUE**

4. Defendant MENU FOODS INCOME FUND is an unincorporated company with its principal place of business in Ontario, Canada. It is doing business in the State of Arkansas. Jurisdiction is appropriate pursuant to the Arkansas Long Arm Statute, Sec. 16-4-101, and service may be effected through the Hague Convention on service abroad of judicial and extrajudicial documents and civil or commercial matters (The Hague Convention) at 8 Falconer Drive, Streetsville, Ontario, Canada L5N 1B1.

5. MENU FOODS MIDWEST CORPORATION is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

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6. Defendant MENU FOODS SOUTH DAKOTA INC. is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

7. Defendant MENU FOODS HOLDINGS, INC. is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

8. Defendant MENU FOODS, INC. is a New Jersey corporation and may be served through its registered agent for service, Corporation Trust Company, 820 Bear Tavern Road, West Trenton, New Jersey.

9. Defendants MENU FOODS INCOME FUND, MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC. are hereinafter referred to collectively as "Defendants" or "MENU."

10. Upon information and belief, Defendants MENU FOODS MIDWEST CORPORATION, MENU FOODS SOUTH DAKOTA INC., MENU FOODS, INC., and MENU FOODS HOLDINGS, INC. are wholly owned subsidiaries of MENU FOODS INCOME FUND, a business entity registered in and headquartered in Ontario, Canada. MENU provides principal development, exporting, financing, holding company, marketing, production, research and servicing for MENU animal food products in the United States, including canned and foil pouched dog and cat food. MENU FOODS INCOME FUND is one of the largest animal food producing companies in the world, and MENU operates as one of the largest animal food companies in the United States,

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whether measured by number of products produced and sold, revenues, or market capitalization.

11. At all times herein mentioned, Defendants were engaged in the business of the manufacturing, packaging, marketing, distribution, promotion, and sale of dog and cat canned and foil pouched food products (hereinafter the "Product"), and at all times herein relevant, were engaged in the promotion and marketing of animal food products, including canned and foil pouched dog and cat food.

12. Plaintiff CHARLES RAY SIMS resides at 2705 W. Dogwood, Rogers, Arkansas. At all times material to this complaint, he was a resident of Rogers, in the State of Arkansas.

13. Plaintiff PAMELA SIMS resides at 2705 W. Dogwood, Rogers, Arkansas. At all times material to this complaint, she was a resident of Rogers, in the State of Arkansas.

14. Plaintiffs CHARLES RAY SIMS and PAMELA SIMS were the owners of a family dog ("ABBY") at all times material to this complaint.

15. This Court has diversity jurisdiction and jurisdiction pursuant to the Class Action Fairness Act of 2005.

#### CLASS ACTION ALLEGATIONS

16. Defendant MENU manufactured, distributed, marketed and sold canned and foil pouched dog and cat food to consumers in the United States. These consumers compose the putative class in this action and have rights that are substantially the same.

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17. Defendant MENU has issued a recall for over 90 brands of dog and cat canned and foil pouched food in the United States since March 16, 2007, translating to in excess of sixty million cans and pouches of dog and cat food recalled throughout the United States.

18. The consumers composing the putative class in this action consist of: (1) all persons or entities who purchased Menu Food brands at any time and disposed of or will not use the products based on publicity surrounding the safety and recall of the products; (2) all persons or entities who purchased Menu Foods products and fed products to their pets on or since December 6, 2006; and (3) all persons or entities who purchased Menu Food products from wholesale distributors on or since December 6, 2006 to the present.

19. The consumers composing the putative class are so numerous that joinder of all members is impracticable; the questions of law or fact are common to all members of the class; the claims and defenses of Plaintiff SIMS are typical of the claims or defenses of the class; and Plaintiff SIMS will fairly and adequately protect the interests of the class.

20. While the exact number and identities of the members of the class are unknown at this time, it is asserted that the class consists of thousands of persons. Upon further identification of the recipient class, class members may be notified of the pendency of this action by published class notice and/or by other means deemed appropriate by the Court.

21. The sheer number of consumers composing the putative class are so numerous as to make separate actions by each consumer impractical and unfair and a